

ORIGINAL



0000081936

BEFORE THE ARIZONA CORPORATION C
RECEIVED

MIKE GLEASON
Chairman
WILLIAM A. MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
KRISTIN K. MAYES
Commissioner
GARY PIERCE
Commissioner

2008 FEB 15 P 2:45

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

FEB 15 2008

DOCKETED BY

nr

IN THE MATTER OF THE APPLICATION
OF ARIZONA WATER COMPANY TO
EXTEND ITS CERTIFICATE OF
CONVENIENCE AND NECESSITY IN
CASA GRANDE, PINAL COUNTY,
ARIZONA

Docket No. W-01445A-03-0559

ARIZONA WATER COMPANY'S
PREHEARING BRIEF

The Commission's Decision No. 69722 remanded this matter to the hearing division to consider whether to delete that part of Arizona Water Company's Certificate of Convenience and Necessity ("CC&N") which includes the Cornman Tweedy 560, LLC ("Cornman Tweedy") property (the "Subject Property"). Under Arizona law, such a deletion proceeding must be governed by the strict standards set forth in *James P. Paul Water Company v. Arizona Corporation Commission*, 137 Ariz. 426, 671 P.2d 404 (1983).¹

Cornman Tweedy has argued incorrectly that different standards apply and that the Commission should consider voluminous and irrelevant evidence which Corman Tweedy seeks to present on topics such as "integrated" water and wastewater providers, development splits, temporary cessation of development and reopening the already-decided

¹ On February 7, 2008, Arizona Water Company filed a motion to strike much of Cornman Tweedy's pre-filed testimony and exhibits. Those arguments will not be repeated here, but that motion is incorporated into this brief by reference.

1 question of necessity of service. The Commission should reject Cornman Tweedy's
2 arguments and confirm its previous holding that, based on the only relevant evidence,
3 Arizona Water Company is the fit and proper entity to provide water service to the Subject
4 Property.

5
6 **I. UNDER ARIZONA LAW AND *JAMES P. PAUL*, THE ONLY RELEVANT**
7 **CONSIDERATION IN THIS DELETION PROCEEDING IS WHETHER**
8 **ARIZONA WATER COMPANY HAS FAILED TO PROVIDE ADEQUATE**
9 **SERVICE AT REASONABLE RATES.**

10 On April 4, 2004 the Commission granted Arizona Water Company an extension of
11 its CC&N to provide water service to the Subject Property in Decision No. 66893. In so
12 doing, the Commission found that Arizona Water Company was the fit and proper entity to
13 provide water service to the Subject Property. Decision No. 66893, Conclusions, ¶ 5. No
14 party, including Cornman Tweedy, sought a rehearing of that Decision, which became final
15 and immune from collateral attack pursuant to A.R.S. § 40-252. Cornman Tweedy then
16 attempted to frustrate Arizona Water Company's performance of certain conditions
17 contained in Decision No. 66893, which resulted in Decision No. 69722 dated July 30,
18 2007. The Commission again found that Arizona Water Company was the fit and proper
19 entity to provide water service to the Subject Property. Decision No. 69722, Conclusions of
20 Law ¶ 3. The Commission remanded "for further proceedings whether Arizona Water
21 should continue to hold a CC&N for the Corman extension area at this time." *Id.*, Findings
22 of Fact, ¶ 101. Arizona Water Company, as "the CC&N holder," was entitled to appropriate
23 notice and an opportunity to be heard before any part of its CC&N could be deleted. *Id.*,
24 Findings of Fact, ¶ 102. Thus, the Commission ordered as follows:

25 **IT IS FURTHER ORDERED** that Arizona Water Company is hereby on notice that
26 the Commission's subsequent proceedings on remand will be for the purpose of
27 considering *whether the Cornman property should be deleted from the CC&N*
28 *extension granted to Arizona Water Company* by Decision No. 66893.

Decision No. 69722, Order (emphasis added). In short, this remand proceeding is limited to
whether Cornman Tweedy can satisfy its burden of proof under Arizona law to demonstrate

1 that the Subject Property can be deleted from Arizona Water Company's CC&N.

2 Cornman Tweedy sought a rehearing of Decision No. 69722 pursuant to A.R.S.
3 § 253, correctly conceding that the *James P. Paul* case limited the matters on remand to
4 solely whether Arizona Water Company could provide adequate service to the Subject
5 Property at reasonable rates. If the Commission felt otherwise, it could have accepted
6 rehearing and changed its decision. But it did not. Cornman Tweedy did not challenge the
7 Decision on appeal. Thus, *both* Decisions No. 66893 and 69722 are now final and immune
8 to collateral attack.

9 This remand proceeding is controlled by *James P. Paul* as a matter of law.
10 According to the Arizona Supreme Court:

11
12 Once granted, the [CC&N] confers upon its holder an exclusive right to provide the
13 relevant service for so long as the grantee can provide adequate service at a
14 reasonable rate. If a [CC&N] within our system of regulated monopoly means
15 anything, it means that its holder has the right to an opportunity to adequately
16 provide the service it was certified to provide. *Only upon a showing that a certificate*
17 *holder, presented with a demand for service which is reasonable in the light of*
18 *projected need, has failed to supply such service at a reasonable cost to customers,*
19 *can the Commission alter its certificate. Only then would it be in the public interest*
20 *to do so.*

21 137 Ariz. at 429, 671 P.2d at 407 (emphasis added). The Supreme Court further held that
22 "A system which did not provide certificate holders with an opportunity to provide adequate
23 service at reasonable rates before deletion of a certificated area could be made would be
24 antithetical to the public interest for several reasons." *Id.* at 429, 671 P.2d at 407.

25 Although Decision No. 69722 stated that this remand proceeding "should be broad in
26 scope so that the Commission may develop a record to consider the overall public interest
27 underlying service to the Cornman property," Decision No. 69722, Findings of Fact, ¶ 104,
28 these deletion proceedings also must comply with Arizona law enunciated in *James P. Paul*.
Thus, the only permissible issues allowed by Arizona law are those specified by the
Supreme Court – that is, can Arizona Water Company (1) provide adequate service to the
Subject Property (2) at a reasonable rate?

1 The answers to the only relevant questions under Arizona law are obvious. Cornman
2 Tweedy concedes that there is no evidence to the contrary. Arizona Water Company has
3 never refused service to anyone in the Subject Property, has never been “presented with a
4 demand for service” by Cornman Tweedy, and has never “failed to supply such service at a
5 reasonable cost to customers.”² *Id.* at 429, 671 P.2d at 407. Therefore, no grounds exist
6 under Arizona law to permit the deletion of any part of Arizona Water Company’s CC&N
7 as a matter of law.

8
9 **II. CORNMAN TWEEDY’S “CURRENT NECESSITY” ARGUMENT HAS NO**
10 **BASIS IN ARIZONA LAW, DOES NOT SUPPORT DELETION, AND MUST**
11 **BE REJECTED.**

12 Based on the proffered testimony of Jim Poulos, Dr. Fred Goldman and Paul
13 Hendricks, Cornman Tweedy seeks to confuse and complicate this remand proceeding by
14 importing into it numerous irrelevant and improper considerations. While the Commission
15 stated that there may not be a “current need or necessity” for service for the Subject
16 Property in Decision No. 69722, Findings of Fact, ¶ 100, it also found that there is a public
17 need for water services in the CC&N extension area, which not only included the Subject
18 Property but nine additional sections of land requiring water service in the future, *see*
19 Decision No. 66893, Conclusions of Law, ¶ 4, and that finding is final and immune from
20 collateral attack. The alleged lack of a current need for service cannot support a deletion
21 here as a matter of law. Moreover, neither *James P. Paul* nor any other Arizona case
22 provides that a temporary ebb in development is a legitimate basis for a CC&N deletion
23 where, as here, the CC&N has already been granted and that grant is final in every respect.

24 The result sought by Cornman Tweedy would be horrific public policy as well.
25 Allowing CC&Ns to be revoked or deleted based on the whims of developers and the ebb
26 and flow of the housing market would result in the proliferation of ever-changing “swiss

27 ² In Decision No. 66893, the Commission also ordered that Arizona Water Company
28 apply its Commission-approved water rates, which must be deemed to be reasonable
as a matter of law.

1 cheese” holes in CC&Ns that would open and close over time depending on local demands
2 and economic conditions. No water utility could make any meaningful plans or invest in
3 infrastructure with any certainty because, if Cornman Tweedy had its way, CC&Ns could
4 suddenly develop gaps and perforations based on the variable plans of landowners and
5 developers. Such a result would destroy the very purpose for the Commission’s grant of a
6 CC&N, and such an argument rightfully has no place in a deletion proceeding. *James P.*
7 *Paul*, 137 Ariz. At 429-30, 671 P.2d at 407-08. If such an argument had merit, then
8 Picacho’s CC&N for the remaining portion of EJR Ranch Property would likewise have to
9 be deleted – a result that Cornman Tweedy and its affiliate Robson Communities do not
10 seek.

11 Cornman Tweedy’s arguments concerning requests for water service and the property
12 owner’s desires are also irrelevant. Such factors are *not* part of the *James P. Paul* deletion
13 test, and the Commission has already found that Arizona Water Company received requests
14 for water service from other property owners in the area, including the owner of a portion of
15 the Subject Property at the time. A property owner’s desires can be as transitory as its
16 development plans. Allowing pockets of an existing CC&N to be deleted based on nothing
17 more than the dictates of a newly-arrived landowner who wants a different water company
18 would undercut the very purpose of granting a CC&N. Cornman Tweedy also argues that
19 the Commission should avoid “splitting the development between two water providers.”
20 Poulos Direct Testimony at 9, line 10-12. This consideration is also absent in *James P.*
21 *Paul*. Moreover, a unitary development *did* exist on the Subject Property at the time of
22 Decision No. 66893; Cornman Tweedy purchased the property knowing that part of its
23 development was already in Arizona Water Company’s CC&N. Cornman Tweedy made
24 the same argument in the proceeding that led to Decision No. 69722, and cannot be allowed
25 to raise this issue again. Finally, Cornman Tweedy’s arguments about the alleged benefits
26 of “integrated” water and wastewater providers also does not constitute permissible grounds
27 for deletion under *James P. Paul*.
28

1 Respectfully submitted this 15th day of February, 2008.

2 BRYAN CAVE LLP

3
4 By 

5 Steven A. Hirsch, #006360

6 Rodney W. Ott, #016686

7 Two N. Central Avenue, Suite 2200

8 Phoenix, AZ 85004-4406

9 Attorneys for Arizona Water Company

10 ORIGINAL and 17 copies filed this
11 15th day of February, 2008, with:

12 Docket Control
13 Arizona Corporation Commission
14 1200 W. Washington Street
15 Phoenix, AZ 85007

16 A copy of the foregoing hand-delivered
17 this 15th day of February, 2008, to:

18 Christopher C. Kempley, Chief Counsel
19 Legal Division
20 ARIZONA CORPORATION COMMISSION
21 1200 West Washington Street
22 Phoenix, AZ 85007

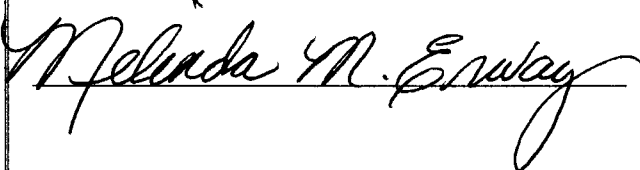
23 Ernest G. Johnson, Director
24 Utilities Division
25 ARIZONA CORPORATION COMMISSION
26 1200 West Washing Street
27 Phoenix, AZ 85007

28 Lyn Farmer
Chief Administrative Law Judge
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

1 And copies mailed or e-mailed this date, to:

2
3 Jeffrey W. Crockett, Esquire e-mail: jcrockett@swlaw.com
4 Marcie Montgomery, Esquire
5 SNELL & WILMER
6 One Arizona Center
7 Phoenix, AZ 85004-2202

8 Peter M. Gerstman
9 Vice President and General Counsel
10 ROBSON COMMUNITIES, INC.
11 9532 E. Riggs Road
12 Sun Lakes, AZ 85248

13 
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28